

1                   BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
2                   STATE OF WASHINGTON

3   ATLAS FOUNDRY & MACHINE )  
4   COMPANY,                    )   PCHB NO. 91-210  
5                   Appellant,   )  
6                   v.            )   ORDER OF DISMISSAL  
7   STATE OF WASHINGTON,       )  
8   DEPARTMENT OF ECOLOGY,    )  
9                   Respondent.   )  
10   \_\_\_\_\_ )

11           This matter came before the Pollution Control Hearings Board ("Board") on the  
12   Department of Ecology's ("Ecology") Motion of Dismissal. The Board was comprised of  
13   Robert V. Jensen, presiding, Harold S. Zimmerman, Chairman, and Annette S. McGee,  
14   member.

15           The appellant Atlas Foundry and Machine Company ("Atlas") was represented by  
16   Charles K. Douthwaite, attorney, of Eisenhower and Carlson. The respondent, the  
17   Department of Ecology, was represented by Ronald L. Lavigne, Assistant Attorney General.

18           The Board reviewed Ecology's: Motion for Dismissal, Memorandum in Support of  
19   Motion to Dismiss, and Declaration of Cathy Downs; and Atlas' Opposition to Respondent's  
20   Motion for Dismissal and Affidavit of Jeff Stoflet. Atlas had also moved for Summary  
21   Judgment on a separate basis, and for a Stay

22           RCW 48.31B.310(1) requires that appeals of Ecology permits to the Board be filed  
23   with the Board "within thirty days after receipt of the order."  
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1 WAC 371-08-080(1) requires that such appeals be filed with the Board "within thirty  
2 days from the date the order or decision of the agency was communicated to the appealing  
3 party."

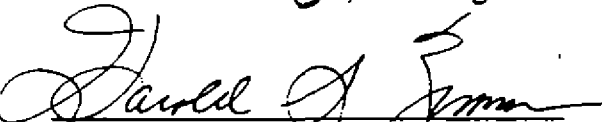
4 Communicate means "to make known" Black's Law Dictionary, 279 (6th ed. 1990).  
5 The permit was received at the company by certified mail on August 12, 1991. The permit  
6 was both received and made known to the president of the company no later than Monday,  
7 August 19. The Board is unaware of any requirement that permit decisions be communicated  
8 to any particular person in a company. The appeal was filed with the Board on September 19,  
9 1991, which is more than thirty days after the receipt of the permit by Atlas.

10 Accordingly, the Board grants Ecology's motion and ORDERS that the appeal filed by  
11 Atlas Foundry and Machine Company be hereby dismissed. Because this ruling is dispositive  
12 of the case, the Board does not reach the motions made by Atlas.

13 Done this 6<sup>th</sup> day of October, 1992.

14 POLLUTION CONTROL HEARINGS BOARD

15   
16 ROBERT V. JENSEN, Presiding

17   
18 HAROLD S. ZIMMERMAN, Chairman

19   
20 ANNETTE S. MCGEE, Member

21 P91-210D

1                   **BEFORE THE POLLUTION CONTROL HEARINGS BOARD**  
2                   **STATE OF WASHINGTON**

3   **ATLAS FOUNDRY & MACHINE)**  
4   **COMPANY,                    )**       **PCHB NO. 91-210**  
5                   **Appellant,        )**  
6                   **v.                    )**       **ORDER DENYING**  
7                                       **)**       **RECONSIDERATION**  
8   **STATE OF WASHINGTON,        )**  
9   **DEPARTMENT OF ECOLOGY, )**  
10                                       **)**  
11                   **Respondent.        )**  
12                                       **)**

13           The Pollution Control Hearings Board ("Board") on October 6, 1992, entered an order  
14   dismissing Atlas Foundry & Machine Company's ("Atlas") appeal of a National Pollutant  
15   Discharge Elimination System ("NPDES") permit issued by the Department of Ecology  
16   ("Ecology")

17           On October 16, 1992, the Board received a Petition for Reconsideration filed by Atlas.  
18   Accompanying the petition were affidavits from Nathan A. Graves, Steven P. Canton and  
19   Charles K. Douthwaite.

20           None of the affidavits supplied counter the previous affidavits or declarations filed in  
21   this case, upon which the dismissal was based. Ecology on March 27, 1992, filed a  
22   declaration which alleged that the NPDES permit was issued to Atlas on August 9, 1991. The  
23   certificate of return, which is addressed to James Reder, President of Atlas, and is signed by  
24   an Atlas employee is dated Monday, August 12, 1991. A copy of this certificate is attached to  
25   the declaration. The certificate was returned to Ecology on August 15, 1991.

1 On August 15, 1992, Atlas submitted an affidavit of Jeff Stoflet, in response to  
2 Ecology's Motion to Dismiss. Mr. Stoflet stated that he was the Atlas employee who  
3 submitted the NPDES permit application for Atlas. Mr. Stoflet admitted that the permit was  
4 delivered to Atlas on Monday, August 12, 1991. He stated that the plant was shut down the  
5 week of August 12, 1991. Mr. Stoflet declared that he was on vacation until Tuesday, August  
6 20, 1992. He stated that he did not see the permit until August 20. Attached to his affidavit  
7 is a calendar which shows that the president was on vacation through Friday, August 16, 1991.  
8 The president is not shown as being away from the office on Monday, August 19. Mr. Stoflet  
9 stated that the earliest Mr. Reder could have personally read the permit, or have been aware of  
10 its contents was August 19, 1992.

11 Atlas first argues that Ecology had a duty to communicate or deliver the permit to Mr.  
12 Stoflet, who it alleges, was the designated official handling the permit.

13 Atlas has failed to cite any authority for this proposition, nor do we find any. RCW  
14 43.21B.310 states that:

15  
16 any permit, certificate, or license issued by the department may  
17 be appealed to the pollution control hearings board and served on  
18 the department or authority within thirty days after receipt of the  
order. (emphasis added.)

19 Atlas does not deny that it, the company, did receive the order on August 12, 1991.  
20 Ecology was not, contrary to Atlas' assertions, required to obtain personal service on any  
21 particular official of the company. Here the permit was sent to the corporate head office and  
22 received by a receptionist. The receipt of an NPDES permit is not comparable to the filing of  
23 a lawsuit where personal service is required. Indeed, issuance of an NPDES permit is merely  
24 Ecology's final step in a process of interaction between it and a waste discharger. Ecology can  
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1 fairly assume that when an NPDES permit is signed for and received by a company at its main  
2 office, that the permit has been received by that entity.

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4 The case relied upon by Atlas do not support a different result. In Tarabochia v. Gig  
5 Harbor, 28 Wn.App 119, 622 P.2d 1283 (1981) the Court of Appeals affirmed the Shorelines  
6 Hearings Board's dismissal of an appeal. The appeal was filed in Superior Court 33 days after  
7 that Board mailed its decision to the parties. The court could find no statutory duty on the  
8 Board to serve a final decision on the parties. Rather, the former Administrative Procedure  
9 Act merely required notification by mailing a copy of the decision to the parties. Tarabochia  
10 at 28 Wn.App 122; RCW 34.04.120.

11 RCW 43.21B.310 requires that the appeal be filed within 30 days of receipt by the  
12 appellant of Ecology's order. The permit was received by the appellant, Atlas, on August 12,  
13 1991. Its appeal was filed on September 19, 1991, 38 days later. Ecology fulfilled its  
14 statutory duty when the permit was received by Atlas on August 12.

15 Atlas next urges the Board to grant reconsideration because of alleged defects in  
16 Ecology's notice. Atlas contends that contrary to RCW 43.21B.310(6), the notice apprising  
17 Atlas of its right of appeal was not conspicuous to it; and that the notice did not identify appeal  
18 to the Board as the exclusive avenue of appeal.

19 The Board need not reach these issues, because the Board lacks jurisdiction over the  
20 subject matter due to Atlas' untimely appeal. Even if the Board did have jurisdiction, it would  
21 conclude that the requirements of RCW 43.21B.310(6) are not mandatory, but are directory in  
22 nature.

23 Moreover, the record fails to show that Atlas was prejudiced by the alleged defects in  
24 the notice. Atlas was aware from the notice that it had to file an appeal within 30 days. If it  
25 failed to do so, its appeal was subject to dismissal. Atlas, in its appeal, has raised numerous  
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4  
1 technical challenges to Ecology's issuance of the NPDES permit. This indicates that Atlas has  
2 a sophisticated understanding of the laws governing said permits. Parties which discharge into  
3 the waters of the state are presumed to know the laws that regulate such discharges, including  
4 the procedural laws that govern challenges to regulatory actions taken under those laws.  
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6 Atlas argues that Leson v Department of Ecology, 59 Wn. App 407, 799 P.2d 268  
7 (1990) supports its theory that the appeal should not be dismissed because Ecology provided a  
8 defective notice. That case is readily distinguishable. The former Administrative Procedure  
9 Act (chapter 34.04 RCW) required that the agency deliver, or mail final decisions to each  
10 party and his attorney of record. RCW 34.04.120. Ecology, in that case, had delivered a  
11 copy to the attorney (who no longer represented the party) but not to the party himself. Based  
12 thereon, the court concluded that an appeal, filed within 30 days that the party was mailed a  
13 copy, was timely. There, but for Ecology's failure, the appeal was timely. Here the facts are  
14 distinct. Atlas has failed to make any showing that the alleged defect caused the appeal to be  
15 filed late.

16 Finally, Atlas argues that the NPDES permit issued to it is defective. Alleged defects  
17 in the permit, do not support reconsideration of the dismissal on the grounds of lack of  
18 jurisdiction.

19 Therefore, the Board denies Atlas' motion and affirms its October 6, 1992, order  
20 dismissing the appeal filed by Atlas Machine and Foundry Company.  
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DONE this 29<sup>th</sup> day of October, 1992.

POLLUTION CONTROL HEARINGS BOARD

  
ROBERT V. JENSEN, Presiding

  
HAROLD S. ZIMMERMAN, Chairman

  
ANNETTE S. MCGEE, Member

P91-210R